Rose Tangil v Alfred Marukin Masang

HIGH COURT (SANDAKAN) — SUIT NO S 22–58 OF 1999
LINTON ALBERT JC
30 SEPTEMBER 2004

Family Law — Matrimonial property — Presumption of advancement — Husband claimed beneficial interest in property purchased in wife's name — Husband dispossessed wife of property — Whether any prior agreement as to who will manage property — Whether property acquired from family income

The plaintiff was formerly the wife of the defendant but they went through an acrimonious divorce in 1999. Prior to the divorce in 1998, the plaintiff had purchased and was in possession of a property in Beluran ('the property') where she operated a restaurant and a lodging house. One month before the divorce was finalized, the defendant by threat of force, had completely dispossessed the plaintiff of the property. The defendant then rented out the property and pocketed the proceeds. The plaintiff claimed vacant possession of the property, rental of the property since dispossession and damages. The defendant's defence were: (1) it was mutually agreed between him and the plaintiff that the defendant would manage the business in the property; and (2) the defendant had a share in the beneficial interest in the property because it was acquired with income from the family business.

Held, allowing the plaintiff's claim with costs:

(1) It was virtually inconceivable that there was an agreement between the plaintiff and the defendant that the business in the property be managed by the defendant. Hence, the allegation that the defendant was entitled to possession of the property on the basis that there was mutual agreement was unsustainable (see para 4).

(2) There is no doubt that the defendant did in fact contribute to the setting up and supervision of the businesses both in cash and in kind as it was reasonable to expect a husband to do so for the benefit of his wife. However, that did not mean that the defendant had thereby acquired a share in the beneficial interest to the property. Under the doctrine of advancement, for a property purchased in the name of a stranger, there is generally a presumption that the person in whose name the property is purchased is a trustee for the person who paid the purchase money. In the case of a wife, however, the presumption is the other way, namely that the purchase is for the benefit of the person in whose name the purchase is made (see para 5); *Re Kavena Hadjee Mohamed Yoosuf, Decd Estate & Trust Agencies (1927) Ltd v Fatimah Sham Binte Hadji Sahib & Ors* [1936] MLJ 78 followed.

(3) The uncivil method used by the defendant to dispossess the plaintiff belied the defendant's claim to a share of the beneficial interest in the

property. It was also noteworthy that the actions of the defendant were utterly inconsistent with his claim to a share of the beneficial interest in the property in that he had purposely allowed the arrears of installment payment for the purchase of the property to accumulate (see para 6).

[**Bahasa Malaysia summary**

Plaintif adalah bekas isteri defendan dan mereka telah melalui perceraian yang sengit di dalam tahun 1999. Sebelum bercerai, dalam tahun 1998, plaintif telah membeli dan mempunyai milikan sebuah hartanah di Beluran ('hartanah tersebut') di mana beliau telah mengendalikan sebuah restoran dan sebuah rumah penginapan. Sebulan sebelum perceraian diselesaikan, defendan mengugut akan menggunakan kekerasan dan telah mengambil milikan hartanah tersebut dari plaintif. Defendan kemudiannya telah menyewakan hartanah tersebut dan mengambil hasil darinya. Plaintif menuntut milikan kosong hartanah tersebut, sewaan hartanah tersebut sejak dari rampasan milikan dan ganti rugi. Pembelaan defendan adalah seperti berikut: (1) ianya telah dipersetujui secara bersama oleh defendan dan plaintif yang bahawa defendan akan mengendalikan perniagaan dihartanah tersebut; dan (2) defendan mempunyai bahagian di dalam kepentingan benefisial hartanah tersebut kerana ianya diperoleh dengan pendapatan dari perniagaan keluarga.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Ianya amat sukar untuk dipercayai bahawa terdapatnya satu persetujuan di antara plaintif dan defendan yang bahawa perniagaan di hartanah tersebut akan diuruskan oleh defendan. Dari itu, dakwaan yang bahawa defendan berhak memiliki hartanah tersebut atas dasar satu perjanjian bersama di antara pihak-pihak wujud tidak dikekalkan (lihat perenggan 4).

(2) Tidak dapat diragukan yang defendan sememangnya menyumbang kepada penubuhan dan penyeliaan perniagaan tersebut dalam bentuk wang tunai dan juga sebaliknya sebagaimana yang dijangka wajar dari seorang suami untuk berbuat demikian untuk faedah isterinya. Namun begitu, ianya tidak bermakna yang defendan dengan itu telah memperoleh sebahagian kepentingan benefisial di dalam hartanah tersebut. Di bawah doktrin pendahuluan, untuk sesuatu hartanah yang dibeli di bawah nama seorang yang lain, terdapat satu anggapan umum yang orang yang atas namanya hartanah itu dibeli adalah seorang pemegang amanah kepada orang yang membayar harga belian. Namun begitu, di dalam kes seorang isteri, anggapan adalah sebaliknya, iaitu, pembelian adalah untuk faedah orang yang atas namanya pembelian itu dibuat (lihat perenggan 5); *Re Kavena Hadjee Mohamed Yoosuf, Decd Estate & Trust Agencies (1927) Ltd lwn Fatimah Sham Binte Hadji Sahib & Ors* [1936] MLJ 78 diikut.

(3) Kaedah tak bertamadun yang digunakan oleh defendan untuk mengambil milikan dari plaintif tidak menampakkan niat defendan untuk berkongsi

kepentingan benefisial dalam hartanah tersebut. Ianya juga wajar diberi perhatian yang tindakan defendan adalah tidak konsisten sama sekali dengan dakwaannya berhubung dengan perkongsian kepentingan benefisial dalam hartanah tersebut kerana beliau dengan sengaja membiarkan bayaran ansuran hartanah tersebut tertunggak (lihat perenggan 6).]

Notes

For cases on presumption of advancement, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) para 3248.

Cases referred to

Kavena Hadjee Mohamed Yoosuf, Decd Estate, Re & Trust Agencies (1927) Ltd v Fatimah Sham Binte Hadji Sahib & Ors [1936] MLJ 78 (folld)
Lo Nyuk Lin v Susanna Marjoribanks [1999] 3 MLJ 341 (refd)
Selvaduray v Chinniah [1939] MLJ 253 (refd)

Abdul Razak Hj Jamil (Razak & Assocs) for the plaintiff.
Dennis Rantau (Martin Idang Rantau & Co) for the defendant.

Linton Albert JC:

[1] The plaintiff was formerly the second wife of the defendant. They had married on 11 June 1985 at the native court, Beluran. They went through an acrimonious divorce in 1999 with the plaintiff claiming she was physically abused by the defendant and the defendant alleging adultery on the part of the plaintiff. Despite the defendant's protestations, the plaintiff was granted a divorce on 20 April 1999. The defendant is still lamenting the fact that the plaintiff obtained the divorce without his consent and that the allegations of violence made by the plaintiff against him were unfounded. In the midst of the recriminations and just more than a month before the divorce was finalised the defendant by threat of force, had on 15 March 1999 completely dispossessed the plaintiff of the property known as Lot 2, Block C, SEDCO shop house, Beluran ('the property'). The plaintiff now claims vacant possession of the property, rental of the property since dispossession and damages.

[2] The property was purchased by the plaintiff under a sale and purchase agreement dated 22 December 1998 ('the said agreement') between the plaintiff and Perkasa Realty Sdn Bhd ('Perkasa'). The deposit for the purchase of the said property amounting to RM5,737 was paid by the plaintiff on 15 August 1997 on which date she was given possession of the property when the keys to the property were also handed over to the plaintiff. Except for the initial period of several months when the property was rented out to a third party, the plaintiff was in possession of the property where she operated a restaurant on the ground floor and a lodging house on the first floor, until she was chased out and dispossessed of the property by the defendant on 15 March 1999.

[3] The defendant gave a totally different version in his pleaded defence. The defendant averred that it was mutually agreed between him and the plaintiff that the defendant would manage the business in the said property because two other businesses at the Beluran old market building comprising a grocery shop and the other, a food stall, were already being managed by the plaintiff. It is also a substantive part of the defendant's case that he has a share in the beneficial interest in the property because it was acquired with income from the grocery shop and the food stall each of which the defendant claimed to be the 'family business'.

[4] It is virtually inconceivable that there was an agreement between the plaintiff and the defendant that the business in the property be managed by the defendant. In the first place, it was well-nigh impossible for the defendant to manage the business in the property because he was and still is a serving officer with the Beluran district council as a works officer. There was also precious little evidence of the defendant managing any business in the property, apart from the incontrovertible fact that after dispossessing the plaintiff of the property and keeping the plaintiff out of the property by vile and violent threats, the defendant chose to be a sinecure landlord by renting out the property and pocketing the rentals. Hence, the allegation that the defendant was entitled to possession of the property on the basis that there was mutual agreement is unsustainable. It follows, therefore, that the doctrine of estoppel argued by learned counsel for the defendant, Mr Dennis Rantau, does not arise and is accordingly of no assistance to the defendant.

[5] The other part of the defendant's substantive case rests on his claim to a share of the beneficial interest in the property. Oddly enough there is no counterclaim to this effect nor is there a counterclaim by the defendant for possession or part possession of the property. It is contended for the defendant that the grocery shop and the food stall were set up with contributions from the defendant which could very well have been so because I am not persuaded by the testimonies of the plaintiff and the witnesses who testified on her behalf particularly that of her sisters (PW2 and PW4) and that of her mother (PW3) that those businesses were set up exclusively by the plaintiff and members of her family. It is also conceivable that part of the money used by the plaintiff for the initial purchase of the property and some of the subsequent installment payments towards settlement of the purchase price of the property came from the income of the grocery shop and food stall. There is no doubt in my mind that the defendant did in fact contribute to the setting up and supervision of these businesses both in cash and in kind as it is reasonable to expect a husband to do so for the benefit of his wife. Hence, it is also probable that the defendant played an important part in the plaintiff's selection by the relevant authorities to purchase the property. Be that as it may, I do not hold the view that the defendant had thereby acquired a share in the beneficial interest to the property. This is because of the doctrine of advancement which was

succinctly laid out in *Kavena Hadjee Mohamed Yoosuf, Decd Estate, Re & Trust Agencies (1927) Ltd v Fatimah Sham Binte Hadji Sahib & Ors* [1936] MLJ 78 where at p 85 Terrell J stated:

> As regards the doctrine of advancement, this arises when a property is purchased in the name of a stranger when there is generally a presumption that the person in whose name the property is purchased is a trustee for the person who paid the purchase money. In the case of a wife or child, however, the presumption is the other way, namely that the purchase is for the benefit of the person in whose name the purchase is made. The doctrine can apply where the transaction has actually been completed or where, as in *Drew v Martin* 71 ER 441 the contract could be specifically enforced. It obviously cannot apply to money that has not yet been advanced and where there is no binding contract which could be enforced.

[6] Regardless of the unsubstantiated contention by learned counsel for the plaintiff, Encik Abdul Razak Hj Jamil, that the defendant was, by virtue of the fact that he was a government employee, prohibited from venturing into business and could not therefore have had any interest in the grocery shop and the food stall and ultimately the property, there is nothing upon which it can be justifiably held that the contribution made by the defendant, either directly or indirectly towards making it possible for the plaintiff to purchase the property, was otherwise than for the benefit of the plaintiff who was then his wife. Indeed, the unorthodox manner in which the defendant evicted the plaintiff from the property was prompted not so much by the defendant's claim to the beneficial interest in the property but by the recriminations engendered by their divorce proceedings. The uncivil method used by the defendant to dispossess the plaintiff belies the defendant's claim to a share of the beneficial interest in the property. It is also noteworthy that the actions of the defendant were utterly inconsistent with his claim to a share of the beneficial interest in the property in that he had purposely allowed the arrears of installment payment for the purchase of the property to accumulate to the extent of RM50,124.92, from a mere two installment of RM1,352 per month at the time the defendant took exclusive possession of the property in March 1999. Surely, that is a discordant note to the otherwise harmonious tune of the defendant's claim to a share in the beneficial interest in the property. In fact Perkasa did commence proceedings against the plaintiff because of the arrears but the proceedings were not pursued to execution.

[7] I do not think that the authority cited by learned counsel for the defendant has any application here. *Lo Nyuk Lin v Susanna Marjoribanks* [1999] 3 MLJ 341 concerned the successful claim of the mistress of the deceased registered owner against the administratrix who was also the wife of the deceased, to the beneficial interest in the disputed property because she had contributed a certain sum to the deceased for the servicing of the loan for the houses built on the disputed property. The facts and circumstances in *Lo Nyuk Lin v Susanna Marjoribanks* are totally different and is therefore of no assistance to the defendant.

[8] For the reasons aforesaid, I am of the view and so find that the plaintiff has established her pleaded case on a balance of probability and that the defendant has failed to persuade me that there is merit to the alternative version set up in his pleaded defence and therefore the substantive matter upon which the defendant's pleaded defence is founded is unsustainable (*Selvaduray v Chinniah* [1939] MLJ 253). The plaintiff's claim is, therefore, allowed with costs to be taxed. The defendant is accordingly ordered to give vacant possession of the property to the plaintiff forthwith and pay the plaintiff a sum of RM74,200 representing the rental collected by the defendant from April 1999 to September 2004 with interest thereon at the rate of 8% per annum from date of judgment until full payment. I make no order as to damages because there is no basis for doing so.

Plaintiff's claim allowed.

Reported by Loo Lai Mee